Supreme Court, U.S.
FILED
AUG 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1957

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

R. K. PROCUNIER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CLIFTON FRANSAW,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S SUPPLEMENTAL APPENDICES

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General
for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

ROBERT S. WALT
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

**Attorney of Record*

BEST AVAILABLE COPY

APPENDIX I

Affirmed and Opinion filed June 30, 1983

CLIFTON FRANSAW, Appellant

A14-82-022-CR **VS.**

THE STATE OF TEXAS, Appellee

Appeal from 262nd District Court
of Harris County
Cause No. 321,485

OPINION

Appeal is taken from a conviction of voluntary manslaughter. A jury found appellant guilty and assessed punishment at life imprisonment.

Appellant contends that the trial court erred by overruling his challenges for cause of two jurors; by allowing the State to impeach him with a felony conviction which was not final; and in a supplemental brief he maintains that the indictment was fundamentally defective. Finding these contentions without merit, we affirm the conviction.

In grounds of error one and two, appellant contends that the trial court erred by overruling his challenges for cause of two venire members. Appellant's contention that venire member Churts was biased against the minimum punishment for murder is based on a lengthy colloquy between counsel, the Court, and Churts. Churts was asked by defense counsel whether she could consider the minimum range of punishment for murder. She replied, "Not if someone killed someone." Churts was then questioned extensively outside the hearing of the venire. The prosecutor explained that punishment is based on the evidence heard at trial, and that jurors are asked to keep an open mind. When Churts insisted that she believed five years was not punishment for taking someone's life, the Court

proceeded to rehabilitate her. Finally, she said she would keep an open mind, and that there could be cases where she might consider the minimum punishment.

We do not normally approve of lengthy attempts by the Court to rehabilitate a juror who has repeatedly and firmly expressed a bias or prejudice. However, the Court of Criminal Appeals has expressly approved juror rehabilitations similar to the one here. *Barefoot v. State,* 596 S.W. 2d 857 (Tex. Crim. Appp. 1980), *cert. denied,* 453 U.S. 913 (1981). Accordingly, we overrule appellant's first ground of error.

Appellant next argues that venire member Bell was biased and should have been stricken for cause because he was unable to accept appellant's right to remain silent and present no evidence in his defense. Defense counsel asked whether anyone felt appellant was guilty because he was charged with a crime. Venire member Bell nodded his head, whereupon a conversation took place outside the hearing of the remaining panel. Bell erroneously believed that the State must have had a preponderance of the evidence before charging appellant. Bell said he would not automatically find appellant guilty, but that he would wait and listen to the evidence. *Barefoot* is likewise controlling here. We hold that the trial court did not err by overruling appellant's challenges for cause of venire member Bell. Appellant's second ground of error is overruled.

In his third ground of error, appellant contends the trial court erred by allowing the State to impeach him with a felony conviction which was not final. On August 4, 1981, appellant pled guilty to the offense of aggravated robbery and received a ten year sentence. Appellant testified that he filed a notice of appeal to the district clerk's office by certified mail within ten days of being sentenced; when he received no response, he filed an application for a writ of mandamus in the Court of Criminal Appeals. Appellant entered two exhibits into evidence which purported to be the certified mail receipts of his appeal notice. However, the notice of appeal he allegedly mailed was not in the court's file, nor did the docket sheet contain any such notice. The copies of the certified mail receipts were for a writ of mandamus application mailed to the Court of Criminal Appeals, and a notice from that court denying his application. The

trial court correctly admitted the conviction for impeachment purposes as appellant failed to meet his burden of proving the conviction was not final. *Johnson v. State,* 583 S.W.2d 399 (Tex. Crim. App. 1979). Appellant's third ground of error is overruled.

In a supplemental ground of error, appellant asserts that the indictment is fundamentally defective, citing the original panel opinion in *Lugo-Lugo v. State.* The Court of Criminal Appeals, on the State's motion for rehearing, has overruled the panel opinion. *Lugo-Lugo v. State,* No. 60,018 (Tex. Crim. App., April 27, 1983)(not yet reported). There being no fundamental error, appellant's supplemental ground of error is overruled.

The conviction is affirmed.

/s/ Joe L. Draughn

Judgment rendered and Opinion filed June 30, 1983.

Panel consists of Chief Justice J. Curtiss Brown and Associate Justices Draughn and Ellis.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLIFTON FRANSAW ★	
(Full Name) Petitioner ★	
★	
328962 ★	
(Prisoner Number) ★	
★	
_____ ★	
(Name under which convicted if ★	
not the same as above) ★	
★	**CIVIL ACTION NO. H-84-108**
D.V. McKASKLE ★	**(To be supplied by the Clerk**
Respondent ★	**of the District Court.)**

PETITION FOR WRIT OF HABEAS CORPUS
OF A PERSON IN STATE CUSTODY

Instructions - Read Carefully

This packet includes three copies of a petition form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your petition. You should also keep an additional copy of the petition for your own records. *All copies of the petition must be identical to the original.*

The Clerk will not file your petition unless it conforms to these instructions and to these forms.

Your petition must be *legibly* handwritten or typewritten. You must sign and swear to the petition. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

In order for this petition to be filed, it must be accompanied by the filing fee of $5.00. In addition, the United States Marshal will require you to pay the cost of serving the petition on each of the respondents.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your petition; the other copy is for your records. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath, or verify it pursuant to 28 U.S.C. §1746.

You will note that you are required to give facts. THIS PETITION SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copy to the Clerk of the United States District Court for the Southern District of Texas, P.O. Box 61010, Houston, Texas.

I. BASIS FOR HABEAS CORPUS RELIEF

A. List specifically and separately the grounds on which you challenge the fact or duration of your confinement. [*Do not* elaborate in this section.]

1. DENIED EFFECTIVE ASSISTANCE OF COUNSEL
2. DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

B. State concisely, and in the same order as in the preceding I.A., the facts which support each of those grounds and the manner in which the U.S. Constitution was violated. [You may elaborate here.]

1. SEE ATTACHED MEMO OF LAW

2. SEE ATTACHED MEMO OF LAW

C. Complete the following as to all grounds listed in I.A.

1. The following grounds have been presented previously to this or another court (such as appeal, habeas corpus-state, habeas corpus-federal, etc. The proceeding will be further identified in Articles II and III.)

Ground No.	Proceeding in Which Presented
1 AND 2	**HABEAS CORPUS PETITION (ART. 11.07)**

2. The following grounds have *not* been presented previously for the reason indicated:

Ground No.	Reason Not Presented

II. CONVICTION AND APPEAL

A. The prison unit in which you are confined: **BETO UNIT #2, TEXAS DEPARTMENT OF CORRECTIONS; Route 2, Box 250, Palestine, Texas 75800**

B. Name and location of the court which imposed the sentence(s) under which you are confined: **183RD JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS**

C. The indictment or criminal information number(s) of the case and the offense(s) for which sentence was imposed:
1. **CAUSE NO. #223395, OFFENSE CHARGED, ROBBERY**

D. The date upon which sentence was imposed and the terms of the sentence:
2. **OCTOBER 31, 1975, FOUR (4) YEAR SENTENCE**

E. What was your plea?

1. Not Guilty__ 2. Guilty X 3. Nolo contendre__

F. If you were found guilty after a plea of not guilty, the finding was made by:

1. Judge without a jury_____.

G. Did you appeal from the judgment of conviction or the imposition of sentence: 1. Yes____ 2. No__X

H. If you did appeal, complete the following:

1 . The name and location of each court to which appealed:

N/A

2. The date and result of action by each appellate court:

N/A

3. If known, the citations to any written opinion or orders entered pursuant to such appeals: (If available, attach a copy of any opinion or order. A copy should be attached to each of the Habeas forms).

N/A

III. POST-CONVICTION RELIEF

A. Prior tc this petition have you filed with respect to this conviction (other than direct appeal):

1. Any petition in a court of the State of Texas for habeas corpus relief pursuant to Article 11.07, Texas Code of Criminal Procedure?

YES

2. Any petition in federal court for habeas corpus relief&

NO

3. Any petition in a state court by way of *coram nobis*?

NO

4. Any petitions in the United States Supreme Court for Certiorari other than petitions, if any, already specified in 11-H?

NO

5. Any other petitions, motions or applications in this court or any other court? **NO**

B. If you answered "Yes" to any part of III-A, list with respect to each such petition, motion or application:

1. The type or name of each petition, motion or application:

a. **11.07 HABEAS CORPUS PETITION**

2. The name and location of the court in which each was filed:

a. **183RD, DISTRICT COURT, HARRIS COUNTY, TEXAS**

3. The name of the court, and the date, in which any evidentiary hearing was held:

   a. **NONE**

4. The date and disposition by each court:

   a. **NONE**

5. If known, the citations to any written opinions or orders entered pursuant to each such disposition. (If available, attach a copy of any such opinion or order to each Habeas form.)

   NONE; The Writ was Denied by the Texas Court of Criminal Appeals on the 22nd day of February 1984 without an Written Order.

IV. REPRESENTATION BY COUNSEL

A. Were you represented by an attorney at any time during the course of the following preceedings:

1. Arraignment and plea? **YES**

2. Trial, if any? **YES**

3. Sentencing? **YES**

4. Appeal, if any, from the judgment of conviction or the imposition of sentence? **NO**

5. Preparation, presentation or consideration of any petition, motions or application with respect to this conviction(s), which you filed? **NO**

B. If you answered "Yes to one or more proceedings of IV-a above, list the number of such proceeding (1-5), the name and address of each attorney who represented you and whether he was retained by you or was appointed by the court, by completing the following:

Above Proceeding No. (1-5)	Name & Address of Counsel	Retained (R) or Appointed (A)
223395	**Harrison Gregg Jr.** **608 Fannin,** **Suite 440** **Houston, Texas** **77002**	**RETAINED**

V. FILING FEE

Filing fee of $5.00 is enclosed (X), or I will seek leave to file in forma pauperis ( ). If filing in forma pauperis, sworn affidavit in forma pauperis is attached.

Signed this 29 day of February, 1984.

/s/ Clifton Fransaw
(Signature of Petitioner)

VERIFICATION

State of Texas

County of ANDERSON

CLIFTON FRANSAW, being first duly sworn, under oath, says: that he is the petitioner in this action and knows the content of the above petition; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

/s/ Clifton Fransaw

(Signature of affiant-petitioner)

Subscribed and sworn to before me this 29th day of February 1984.

/s/ R.J. Sovall

(Notary Public)
Anders Co, Texas
Comm Exp. 9-20-86

MEMO OF LAW

I.

A. Denied effective assistance of counsel in violation of the 6th and 14th amendment to the constitution of the United States.

B. Denied due process and equal protection of the law, in violation of the 14th amendment to the United States constitution, due to the trial court's failure to advise Petitioner of his appeal rights.

I. (A)

STATEMENT OF THE CASE

1. On the 21st day of August, 1975, Petitioner entered a plea of guilty in cause No. 223395, for the offense of robbery, in the 183rd district court of Harris County, Texas, Petitioner, who was represented by retained counsel John B. Patrick, was given A 10 (Ten) year probation.

2. On or about the 9th day of October, 1975, the District Attorney filed a motion to have Petitioner's probation revoked and sent to the Texas Department of Corrections. On October 21, 1975, Petitioner appeared in the 183rd District Court for a hearing on the States Motion to revoke his probation. Petitioner was represented by retained counsel Harrison Gregg, the hearing was reset for October 31, 1975.

3. On October 31, 1975, Petitioner, along with counsel Gregg, appeared in the 183rd District Court for the revocation hearing. After hearing evidence presented by States attorney, the court found Petitioner guilty of probation violation and ordered the judgment reformed to show four(4) years in prison instead of the Ten (10) years originally imposed. On November 7, 1975, Petitioner filed a timely notice of appeal from the imposition of the judgment and sentence pronounced upon him.

4. On November 10, 1975, Petitioner appeared in court with counsel Gregg for a hearing on his appeal notice. The trial

judge after hearing counsel Gregg tell him that they was dropping the appeal, and Petitioner advising him that he did not want his appeal dropped, advised counsel and Petitioner to go in his chambers and see if they could reach an agreement as to whether there was going to be an appeal or not. Counsel Gregg, Petitioner, Ms. Evelyn J. Fransaw (Petitioner's sister) and Mrs. Mary L. Fransaw (Petitioner's Mother) went into the judge's chambers and discussed the fate of Petitioner's appeal.

5. After being advised by counsel Gregg that he was not retained to handle the appeal, and would do so only if he was paid by Petitioner or his family after informing counsel Gregg that his mother and sister could not afford to pay him for representing him on appeal, Petitioner allowed counsel Gregg to make an involuntary dismissal of his appeal notice. The Trial Judge, nor counsel Gregg, ever advised Petitioner that he could appeal his case with the assistance of court appointed counsel since he was to poor to pay counsel Gregg or any other attorney to handle the appeal for him, and it was his desire to continue with the appeal to the Texas Court of Criminal Appeals.

II. (B)

ARGUMENT AND AUTHORITIES

6. On or about the 1st day of October, 1975, counsel Harrison Gregg was retained by Mary L. Fransaw and Evelyn J. Fransaw to represent Petitioner during a hearing in cause No. 223395 in the 183rd district court of Harrison County, Texas, wherein the State of Texas filed a motion to revoke petitioner's probated term of ten(10) years which he received in cause No. 223395 on the 21st day of August, 1975,. Counsel Gregg was paid the sum of $750.00 for his representation on the probation revocation hearing. (See exhibits A & B)

7. On October 21, 1975, Petitioner and counsel Gregg appeared in court for a hearing on the State's motion to revoke his probation, however, the hearing was reset by the court for the 31st of October, 1975. On October 31, 1975, Petitioner, along with counsel Gregg, appeared in court for the hearing on the State's motion to revoke his probation. The court, after hearing the evidence submitted by the State's attorney, found Peti-

tioner guilty of violating the terms and conditions of his probation. The court ordered the judgment to be reform to four(4) years and proceeded to sentence Petitioner to four (4) years in the Texas Department of Corrections and ordered the sheriff of Harris County to immediately deliver Petitioner to same prison.

8. Petitioner was not questioned by counsel Gregg, either before or after he was sentenced, as to whether he wanted to appeal his case. The trial court judge also failed to inquire of Petitioner about his appeal rights and as to whether he wanted to appeal his conviction or forego his rights of appeal.

III. (C)

PETITIONER'S APPEAL NOTICE

9. Petitioner, after being placed back in the county jail to await transfer to T.D.C., was advised by some other inmates that he could appeal his conviction to the court of criminal appeals. On November 7, 1975, Petitioner's notice of appeal was filed with the clerk of the Harris County District Court in Cause No. 223395, from the judgment and imposition of sentence pronounced upon him on the 31st of October, 1973.

IV. (D)

HEARING ON APPEAL

10. On November 10, 1975, Petitioner and Counsel Gregg appeared in court for a hearing before the honorable judge *Joseph M. Guarino.* Also present in court was Mary L. Fransaw and Evelyn J. Fransaw, (*see exhibit A & B attached hereto).* The hearing was called by the court to determine whether Petitioner was going to continue with his appeal request or if there was going to be a dismissal of the appeal.

11. Counsel Gregg informed the court that Petitioner was going to withdraw his notice of appeal. Petitioner, upon hearing counsel Gregg tell the court that he was withdrawing his notice of appeal, immediately advised the court that he "was not going to withdraw his notice of appeal" because it was his inten-

tions to pursue his appeal to the Court of Criminal Appeals. The Trial Court, upon hearing that there was a disagreement between Petitioner and counsel as to whether or not there was going to be an appeal, requested that they go to his chambers and see if they could come to an agreement among themselves about the appeal issue.

V. (B)

APPEAL DISCUSSION IN JUDGE'S CHAMBERS

12. Petitioner, counsel Gregg, Mary L. Fransaw and Evelyn J. Fransaw went into the chambers of the judge to discuss the fate of the appeal issue. Counsel Gregg told Petitioner that he could appeal his conviction and get an appeal bond set by the court. However, counsel also told Petitioner that he had not been retained to do the above things (*Pursue the appeal or get bond set*). At this time Petitioner and his family explained to counsel Gregg that they were unable to pay him for handleing the appeal. (*see exhibits A & B*). Petitioner, after being led to believe an appeal was only possible if he paid for same, allowed counsel Gregg to withdraw his appeal notice. Petitioner's agreement to let counsel Gregg withdraw his appeal notice was not done with knowing and intelligent participation by him. *Collier v. Estelle,* 488 F.2d 929. Counsel Gregg never advised Petitioner that he could appeal his case as an indigent, i.e., without paying for the attorney or the court records. (See exhibits A & B attached hereto).

VI. (F)

APPEAL WITHDRAWAL: BY COUNSEL GREGG

13. Petitioner and Counsel Gregg, after concluding their appeal discussion went back before the trial judge. Mr. Gregg advised the judge that they had reached a decision to withdraw Petitioner's notice of appeal. The trial judge never inquired of Petitioner as to whether he was making a knowing and intelligent participation in the withdrawl of his appeal. The court also failed to advise Petitioner about his right to appeal with court appointed counsel and free records because he was indigent.

VII. (G)

EFFECTIVE OR INEFFECTIVE: APPEAL RIGHTS

14. It is well settled that an indigent accused is denied effective assistance of counsel at a critical stage of the criminal process when his attorney fails to advise him of his rights to appeal with court appointed counsel, the procedures and time limitations involved in the appeal process *Lumpkin v. Smith, 439 F.2d 1084; Hends v. Wainwright,* 579 F.2d 317. The *Lumpkin* standards announced for court appointed counsel are now equally binding upon retained counsel. *Cuxler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Perez v. Wainwright,* 640 F.2d 596 (5th Cir. 1981)

15. Counsel Gregg was well aware, as evidenced from *exhibits A & B Attached Hereto,* of Petitioner's desire to continue with the appeal of his conviction. Also, counsel Gregg was aware that Petitioner was indigent for appeal purposes especially since he couldn't afford to pay for Gregg's assistance on appeal. Counsel Gregg had a duty under the sixth amendment to the constitution of the United States to advise Petitioner about his right to petition the court for the assistance of appointed counsel to prosecute his appeal. Counsel Gregg deliberately lead Petitioner to believe that an appeal in his case was impossible unless he could afford to pay his own counsel, which was error. *Martin v. State of Texas,* 694 F.2d 423 (5th Cir. 1982).

VIII. (H)

DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNTIED STATES DUE TO THE TRIAL COURTS FAILURE TO ADVISE PETITIONER OF HIS APPEAL RIGHTS.

16. Petitioner's constitutional rights to appeal from the conviction imposed upon him in Cause No. 223395 has been abridged by the failure of the trial court judge to advise him of his appellate rights, and the fact that the court would appoint him an attorney and provide him with a free copy of the trial court records if he was unable to afford the cost of paying for same, *Chapman v. California,* 386 U.S. 18, S.Ct. 824 (1967).

It is evident from the court's dockett sheet enteries for November 10, 1975, and Petitioner's exhibits A & B, that the trial court was aware of Petitioners desire to appeal his conviction. The court knew, or should have had an indication that there was an unresolved dispute between Petitioner and counsel Gregg about the appeal when, after counsel Gregg told the court he was withdrawing Petitioner's notice of appeal, Petitioner advised the judge that he was not going to dismiss his appeal.

17. The trial judge, instead of inquiring of Petitioner about his appeal, and as to what he wanted to do about his appeal, told counsel Gregg and Petitioner to go into his chambers and see if they could reach an agreement among themselves. It is important to note here that the trial judge was aware that Petitioner was a layman of the law, 19 years old and being sentenced on a felony conviction for the first time in his life. Petitioner had no prior knowledge or experience with Texas trial tactics or Appellate procedures should have or could have known that he was entitled to court appointed counsel for the purpose of his appeal. To even think such a thing would be to spin a web of imagination within ones mind that would make Agatha Christie proud. It is beyond a "Shadow of Doubt" that the trial court was more than cursorly aware of Petitioner's desire to appeal his case, as evidenced by his pro-se notice of appeal, and his streneous objection to the court when counsel Gregg advised that there would be no appeal. (See exhibits A & B).

18. The trial court judge abridged Petitioner's right of due process, equal protection of law, effecitve assitance of counsel, and his right to appeal, due to the cursory attention showed to Petitioner and his appeal rights. *Martin v. State,* supra; *Chapman v. California,* supra.

CONCLUSION

19. Wherefore, allthings considered, Petitioner proays that this honorable court will grant him an out of time appeal in this cause, or in the alternative declare the judgement, sentence and conviction in this cause to be void and without any lawful effects of Texas law.

Respectfully Submitted

/s/ Clifton Fransaw

CLIFTON FRANSAW
Rt. 2 Box 250
Palstine, Texas 75801

VERIFICATION

I, Clifton Fransaw, do hereby state upon my oath that I am the Petitioner in the above and herein attached *Memo of Law* and *2254* Habeas Corpus application, and the statement and facts contained herein have been read by me and are true and correct.

/s/ Clifton Fransaw

Clifton, Fransaw, Petitioner

Subscribed and sworn to before me this 29th day of February 1984.

/s/ RJ Shovall

Notary Public in and for
Anderson County, Texas.

9-20-86

My Commission Expires

EXHIBIT No.# -A-

CAUSE NO. 223395

Clifton Fransaw,	§	
Petitioner	§	IN THE DISTRICT COURT
	§	OF HARRIS COUNTY, TEXAS
V.	§	183RD. JUDICIAL
	§	DISTRICT
THE STATE OF TEXAS	§	
Respondent	§	
	§	

AFFIDAVIT OF EVELYN JEAN FRANSAW

State of Texas)
)
COUNTY OF HARRIS)

Before me, the undersigned authority, on this date personally appeared Evelyn Jean Fransaw, who being by me duly sworn upon her oath did depose and say:

"I am employed as a teacher for the Houston Independent School Distirct. On or about the 1st. day of October, 1975, Mr. Harrison Gregg, Attorney At Law in Houston, Texas, was retained by myself and my mother, Mrs. Mary L. Fransaw, to represent my brother, Clifton Fransaw, on a criminal charge of probation violation. Mr. Gregg was paid $750.00 to defend Clifton on the probation violation.

"On October 21, 1975, I went to what was suppose to be a hearing on the state's motion to revoke my brother's probation. I was informed by Mr. Gregg that the court had reset the revocation hearing for October 31, 1975.

"On October 31, 1975, I again appeared in court for the revocation hearing on Clifton's probation. Also present at this hearing was the Judge, Mr. Gregg, Mrs. Mary L. Fransaw, and my brother Clifton. The trial judge revoked Clifton's probation and sentenced him to four(4) years in the Texas Depart-

ment of Corrections. Subsequent thereto, on the 5th day of November, 1975, Clifton called me on the phone and told me that he was going to appeal his conviction to the Court of Criminal Appeals. Clifton also wanted to know if I would be able to help him retain an Attorney for the appeal and maybe help him make an appeal bond.

"On November 7, 1975, Mr. Gregg informed my mother and I during a phone conversation that Clifton had wrote a letter to the judge giving his notice of appeal to the Court of Criminal Appeals. Upon visiting with Clifton in the Harris County jail, I learned that he wanted to appeal his conviction and moreso, wanted an attorney to represent him on that appeal.

"On November 10, 1975, I again appeared in court concerning my brother's case. At this time the trial judge asked Mr. Gregg whether or not he was going to represent Clifton on his appeal. Mr. Gregg informed the court that he was not representing Clifton on any appeal, and further-more, told the judge that they were dismissing the appeal. As soon as Clifton heard Mr. Gregg tell the court this, he jumped up and told the judge that he was not going to dismiss his appeal. The trial judge then told both of them to go into his chambers and see if they could reach an agreement about whether or not there was going to be an appeal.

"Clifton, Mr. Gregg, myself and my mother, all went into the judge's chambers to discuss the appeal issue. At this time Mr. Gregg told us that Clifton could get an appeal and could get an appeal bond set, however, he also told us that he couldn't litigate that issue because he had not been retained to do so. We informed Mr. Gregg at this time that we were uanble to pay him to represent Clifton on appeal. After some debate on the matter, Clifton agreed to let Mr. Gregg withdraw his appeal notice, but only because we couldn't affored to retain his service's for that purpose. At no time during this discussion did Mr. Gregg inform us that the judge would appoint Clifton a counsel for purpose of an appeal if he couldn't afford one.

"After the discussion in the Judge's chambers we went back into the court room and Mr. Gregg informed the Judge that the notice of appeal was going to be withdrawn from the record.

The judge then proceeded to sentence Clifton to four (4) years in the Texas Department of Correction. At no time did the Judge advise Clifton that he could appeal as an indigent defendant. He did not inform Clifton that an attorney could be appointed to the case if he was unable to retain one. We were all under the impression that Clifton could not appeal because we were unable to hire an attorney. This was the only reason Clifton withrew his appeal notice. Of course no one ever told us differently."

VERIFICATION

"I do delcare under the penalty of perjury that his foregoing affidavit is true and correct."

Executed on this the 20th day of February, 1984

/s/ Evelyn Jean Fransaw

Evelyn Jean Fransaw, Affiant
7236 Carothers St.
Houston, Texas 77028
(713) 633-3811

EXHIBIT NO.# -B-

CAUSE NO. 223395

Clifton Fransaw,	§	
Petitioner	§	**IN THE DISTRICT COURT**
	§	**OF HARRIS COUNTY, TEXAS**
V.	§	**183RD. JUDICIAL**
	§	**DISTRICT**
THE STATE OF TEXAS	§	
Respondent	§	
	§	

AFFIDAVIT OF MARY LEE FRANSAW

State of Texas)
)
COUNTY OF HARRIS)

Before me, the undersigned authority, on this date personally appeared Mary Lee Fransaw, who being by me duly sworn upon her oath, did depose and state:

"I am unemployed and a housewife. On or about the 1st day of October 1975, Mr. Harrison Gregg, Attorney At Law in Houston, Texas was retained by me and my daughter, Evelyn Jean Fransaw, to represent my son Clifton Fransaw, on a criminal charge of probation violation. Counsel Gregg was paid the sum amount of $750.00 for his representation of Clifton on his court appearance, on the charge of probation violation. On October 21, 1975, I went to what was suppose to be a hearing on the State's motion to revoke my son's probation. I was informed by Counsel Gregg that the court had reset the revocation hearing for October 31, 1975. On October 31, 1975, I again appeared in court for the revocation hearing on Clifton's probation. Also in person—in court with me, was my daughter Evelyn Jean Fransaw. The Judge revoked Clifton's probation and sentenced him to four (4) years in the Texas Department of Corrections. On or about the 5th day of November 1975, Clifton called me and my daughter on the phone and told us that he was going to appeal his conviction to the Texas Court of

Criminal Appeals in Austin, Texas. Clifton also wanted to know if we would be able to help him retained an Attorney for the appeal, and the making of an appeal bond. On November 7, 1975, Counsel Harrison Gregg informed me and my daughter by telephone that Clifton had wrote a letter to the judge of the court giving his notice of appeal to the Court of Criminal Appeals. Upon visiting with Clifton in the Harris County, jail, I learned that my son wanted to appeal his conviction, and wanted an attorney to represent him on the appeal.

"On November 10, 1975, I again appeared in the court for my son's case. The judge asked Counsel Gregg whether he was going to represent Clifton on his appeal. Counsel Gregg told the judge that they was dismissing the appeal. Clifton told the judge that he was not dismissing his appeal. The judge told Clifton and Counsel Gregg to go into his chambers and see if they could reach an agreement about the appeal. Clifton, Counsel Gregg, my daughter Evelyn and myself went ino a room I assume was the judge's chambers to discuss Clifton's appeal. Counsel Gregg told us that Clifton could appeal his conviction and get an appeal bond set by the judge; but, he was not retained by us (me and my daughter Evelyn) to handle the appeal for Clifton. I advised Counsel Gregg that we was not able to pay him the amount he wanted to handle the appeal for Clifton. Clifton agreed to allow Counsel Gregg to withdraw his appeal against his judgement and will because he could not afford to pay Counsel Gregg to handle his appeal, and we just could not afford to pay an appeal Lawyer to represent him.

"Counsel Gregg at no time during the appeal discussion in the judge's chambers advise Clifton, myself, or my daughter Evelyn, that the trial judge would appoint an attorney to reprsent Clifton on the appeal if he could not afford to hire his own attorney. The appeal was withdrawn by Clifton only because he could not afford to pay Counsel Gregg or any other attorney to handle his appeal. After going back before the judge of the court, Counsel Gregg informed the judge that the notice of appeal was going to be withdrawn from the record.

"The judge proceeded to sentence Clifton to four (4) years in the Texas Department of Corrections. At no time did the trial judge advise Clifton that the Court would appoint him

an attorney to appeal his case if he couldn't afford to hire one. Also the trial judge never asked Clifton or Counsel Gregg about the appeal, or how they reached the decision to withdraw the appeal. Counsel Gregg withdrew Clifton's appeal for the simple reason that my son was not able to afford to pay the cost of his appeal, and not because of Clifton's wanting his appeal dismissed, since Counsel Gregg nor the trial judge told Clifton or me and my daughter Evelyn Fransaw that he could appeal his case with court appointed Counsel at no cost to himself. We was left with the understanding that an appeal was virtually impossible without us paying the money for it."

VERIFICATION

"I do declare under the penalty of perjury that this foregoing affidavit by me is true and correct."

Executed on this the 20th day of February, 1984.

/s/ Mary L. Fransaw

Mary Lee Fransaw, Affiant
7236 Carothers St.
Houston, Texas 77028
(713) 633-3811

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CLIFTON FRANSAW, Petitioner	§	
	§	
vs.	§	CIVIL ACTION NO. H-84-1087
	§	
R. K. PROCUNIER, Respondent	§	

RESPONDENT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME, R. K. Procunier, Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and in response to Petitioner's application for writ of habeas corpus files this his Motion to Dismiss. In support thereof, Respondent would show the Court the following:

I.

JURISDICTION

This Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§2241 and 2254.

II.

DENIAL

Respondent denies every allegation of fact and law made by Petitioner except those supported by the record and those admitted herein.

III.

STATEMENT OF THE CASE

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 220th District Court of Harris County, Texas, in Cause No. 337572, syled *The State of Texas v. Clifton Fransaw,* wherein Petitioner, upon his plea of guilty, was convicted of the offense of aggravated robbery and a ten (10) year sentence was imposed. Respondent has further lawful custody of Petitioner pursuant to a judgment and sentence of the 262nd District Court of Harris County, Texas, in Cause No. 321485, styled *The State of Texas v. Clifton Fransaw,* wherein Petitioner, upon his plea of not guilty, was found guilty by a jury of the offense of voluntary manslaughter and, upon the proof of a prior conviction alleged for enhancement, a sentence of life imprisonment in the Texas Department of Corrections was imposed.

In his application before this Court, Petitioner seeks to challenge the validity of the prior conviction used for enhancement in Cause No. 321485. Petitioner was previously convicted in the 183rd District Court of Harris County, Texas, in Cause No. 223395, wherein Petitioner entered a plea of guilty to the offense of robbery and a ten (10) year sentence in the Texas Department of Corrections was assessed, but the imposition of sentence was suspended and Petitioner was placed on ten (10) years probation. On October 9, 1975, the State filed a motion to revoke Petitioner's probation. On October 31, 1975, Petitioner entered a plea of "true" to the allegations in the State's motion. Probation was then revoked and the sentence was reformed from ten years to four (4) years incarceration in the Texas Department of Corrections. On November 7, 1975, Defendant gave notice of appeal of his conviction. On November 10, 1975, Defendant appeared in open court and withdrew his notice of appeal.

Petitioner did directly appeal his conviction in Cause No. 321485. The Fourteenth District Court of Appeals of Texas affirmed Petitioner's conviction on June 30, 1983. *Fransaw v. State,* No. A14-82-022-CR. A petition for discretionary review was refused by the Texas Court of Criminal Appeals on

November 2, 1983. Petitioner has sought to collaterally attack his conviction in Cause No. 223395 by way of an application for state writ of habeas corpus. This application was denied without written order on the findings of the trial without hearing on February 22, 1984. *Ex parte Clifton Fransaw,* Application No. 10886.

Copies of Petitioner's appellate and state writ files are available and will be forwarded to the Court upon reproduction.

IV.

MOTION TO DISMISS FOR FAILURE TO EXHAUST STATE REMEDIES

Respondent understands Petitioner claims to be as follows:

1. He is presently illegally confined because he was denied the effective assistance of counsel in his prior conviction used for enhancement, in that his counsel failed to advise him of his appellate rights; and

2. He is presently illegally confined because he was denied due process in his prior conviction used for enhancement, in that the trial judge failed to advise him of his appellate right.

In his application for writ of habeas corpus, Petitioner presented the following grounds to the Texas Court of Criminal Appeals:

1. His conviction in Cause No. 223395 was unlawful because he was denied the effective assistance of counsel, in that counsel failed to advise him of his appellate rights; and

2. His conviction in Cause No. 223395 was unlawful in that the trial judge failed to advise Petitioner of his appellate rights.

Under Texas law, a person need not be in custody pursuant

to a conviction before he may challenge the validity of that conviction. *Ex parte Ridley,* 658 S.W.2d 177 (Tex.Crim.App. 1983); *Ex parte Legg,* 571 S.W.2d 930 (Tex.Crim.App. 1978); *Ex parte Guzman,* 551 S.W.2d 387 (Tex.Crim.App. 1977). In his state writ application, Petitioner did not challenge the validity of his current incarceration. Rather, he sought a declaration that the judgment, sentence and conviction in Cause No. 223395 is void or, in the alternative, that he be granted an out-of-time appeal. In the cause now before this Court, Petitioner now claims that his current incarceration is illegal in that the prior conviction used for enhancement was void. Such a claim has never been addressed to the state courts.

The exhaustion doctrine is rooted in the concept of comity. Even though the federal courts are vested with jurisdiction to decide cases involving federal constitutional questions, they will not normally entertain a petition for writ of habeas corpus until the state courts have been accorded an opportunity to pass upon and correct alleged violations of its prisoners' federal constitutional rights. *Picard v. Connor,* 404 U.S. 270, 92 S.Ct. 509 (1971) *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822 (1963). "For a claim to be exhausted, the state court must have been apprised of the facts and the legal theory upon which the Petitioner basis his assertion". *Galtieri v. Wainwright,* 582 F.2d 348, 353 (5th Cir. 1979). The opportunity is accorded and the exhaustion requirement is satisfied when the federal claims have been fairly presented to the state courts for disposition. *Picard v. Connor,* 404 U.S. at 275, 92 S.Ct. at 512. In the case at bar, Petitioner presents both different facts and different legal theories in support of his claims. Petitioner now claims that his present conviction and incarceration are illegal due to an infirmity in his conviction used for enhancement. In this state habeas corpus action, petitioner did not make such a claim. Hence, Petitioner has not exhausted his state remedies.

V.

Should this Court determine that Petitioner has exhausted or that further exhaustion would be futile, it is readily apparent that Petitioner's claim is meritless. At trial, Petitioner failed to object to the introduction of the allegedly infirm prior conviction. Such a failure constitutes a waiver under state law,

and Petitioner is precluded from collaterally attacking the conviction that utilized the allegedly infirm prior conviction. *Hill v. State,* 633 S.W.2d 520 (Tex.Crim.App. 1982). Under the procedural default doctrine of *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558 (1982) and *Wainwright v. Sykes,* 433 U.S. 72 97 S.Ct. 2497 (1977), Petitioner is precluded from raising these claims in federal habeas corpus. *Marks v. Estelle,* 691 F.2d 730 (5th Cir. 1982), *cert. denied* ____U.S.____, 103 S.Ct. 3090 (1983); *Kemph v. Estelle,* 621 F.2d 162 (5th Cir. 1980); *Nichols v. Estelle,* 556 F.2d 1330 (5th Cir. 1977), *cert. denied,* 434 U.S. 1020, 98 S.Ct. 744 (1978). Petitioner is excused from his procedural default only if he can show good cause for his failure to object and actual prejudice resulting therefrom. *Marks v. Estelle,* 691 F.2d at 734. Focusing on the "cause" prong of *Wainwright v. Sykes, supra,* it is apparent that Petitioner can demonstrate no good cause for failing to object to the allegedly infirm prior conviction at the time of his trial in December, 1981. He clearly knew from the moment of the revocation of his probation in Cause No. 223395 that neither the judge nor his counsel informed him of his appellate rights, if the affidavits of his mother and sister are to be believed. Thus, his failure to object is without good cause. Hence, this Court is precluded from reviewing his claims. The petition should therefore be dismissed.

WHEREFORE, PREMISES CONSIDERED, it is respectfully requested that the petition for writ of habeas corpus be dismissed.

Respectfully submitted,

OF COUNSEL:

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

DUANE E. CROWLEY, JR.
Acting Chief, Enforcement Division
Assistant Attorney General

/s/

ROBERT S. WALT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorney for Respondent

NOTICE OF SUBMISSION

To Clifton Fransaw, you are hereby notified that the undersigned attorney will bring the foregoing Motion before the Court on the 30th day of July, 1984, or as soon as the business of the Court will permit.

/s/

ROBERT S. WALT
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Robert S. Walt, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Motion to Dismiss has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested on this the 13th day of July, 1984, addressed as follows:

Clifton Fransaw
TDC #320962
Beto II Unit
Rt. 2, Box 250
Palestine, TX 75801

/s/

ROBERT S. WALT
Assistant Attorney General

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CLIFTON FRANSAW,	§	
	§	
Petitioner	§	
	§	
V.	§	CIVIL ACTION NO. H-84-1087
	§	
R. K. PROCUNIER,	§	
	§	
Respondent	§	

Clifton Fransaw, Palestine, Texas Pro Se.

Robert S. Walt, Assistant Attorney General, Austin, Texas, Attorney for Respondent.

MEMORANDUM AND ORDER

Petitioner Clifton Fransaw brings this petition for writ of habeas corpus challenging the validity of a prior conviction used for enhancement. Petitioner pleaded guilty to a charge of robbery and initially received a ten-year probated sentence in Cause No. 223395. A few months later, in October of 1975, Petitioner's probation was revoked and his sentence reformed to four years' confinement. In Cause No. 321485 this prior felony conviction was used to enhance to life imprisonment Petitioner's punishment pursuant to his conviction of voluntary manslaughter in December of 1981.

At this 1981 trial Petitioner failed to object to the introduction of the 1975 robbery conviction which is attacked in this petition, thereby violating the contemporaneous objection rule under Texas law. *See Hill v. State,* 633 S.W.2d 520 (Tex.Crim.App. 1981, no writ). This procedural default under state law bars federal habeas review unless Petitioner can

establish "cause and prejudice" under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Engle v. Isaac*, 456 U.S. 107 (1982). *See Weaver v. McKaskie*, 733 F.2d 1103 (5th Cir. 1984). Because Petitioner has advanced no reasons for his failure to object to use of the 1975 robbery conviction at his 1981 trial, the grounds for relief advanced in this petition are meritless.

Petitioner's 1975 conviction is also immune from collateral habeas attack because it was the result of a guilty plea. *Tollett v. Henderson*, 411 U.S. 258 (1973). *See also Price v. Beto*, 436 F.2d 1070, 1071 (5th Cir. 1971).

It is, therefore, ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus be in all respects DENIED.

DONE at Houston, Texas, this 20th day of September, 1984.

/s/

United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLIFTON FRANSAW,	§	
	§	
Petitioner	§	
	§	
V.	§	**CIVIL ACTION NO. H-84-1087**
	§	
R. K. PROCUNIER,	§	
	§	
Respondent	§	

FINAL JUDGMENT

In accordance with the Memorandum and Order of the Court entered this date, it is ORDERED that the petition for writ of habeas corpus be in all respects DENIED.

DONE AT Houston, Texas, this 20th day of September, 1984.

/s/

United States District Judge